91-710 (1)

Supreme Court, U.S.
FILED
SEP 9 1991
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Case No.

THE SUPREME COURT OF THE
UNITED STATES OF AMERICA

RALPH E. RISHEL,
consolidated with THOMAS
P. CATON,

Petitioner,

VS.

UNITED MINE WORKERS OF AMERICA
HEALTH AND RETIREMENT FUNDS,

Respondent.

Petition for Writ of
Certiorari to the United
States Court of Appeals for
the Third Circuit

Timothy P. O'Reilly
Counsel for Petitioner

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BEST AVAILABLE COPY

I. QUESTIONS PRESENTED FOR REVIEW

COMES NOW Petitioner above named, Ralph E. Rishel, by his attorney Timothy P. O'Reilly, and files the within Petition for Writ of Certiorari from the Opinion and Judgment entered by the Third Circuit Court of Appeals sustaining Summary Judgment granted in the U.S. District Court of the Western District of Pennsylvania dismissing their Complaint against the United Mine Workers of America Health and Retirement Funds, et al., Respondents herein. The Matter involves Ralph E. Rishel and Thomas P. Caton, both of whom brought an action against the Funds. The cases were consolidated before the Third Circuit Court of Appeals under the Rishel caption and the Petition herein

is filed on behalf of both Plaintiffs and references to Rishel will also include Caton. The question presented for review is whether the Respondents acted in an arbitrary and capricious manner and abused their discretion in denying a pension to Rishel under circumstances that show that Rishel worked under a collective bargaining agreement to which his employer was signatory; which Collective Bargaining Agreement provided for a pension; that said pension was provided to other employees of a competitor of the employer of Rishel, and which employees worked under the same Collective Bargaining Agreement.

II. TABLE OF CONTENTS

I. Questions Presented for Review . . 1

II. Table of Contents and Authorities. 3

III. Opinions of Other Courts 4

IV. Statement of the Grounds on which the Jurisdiction of this Court is Invoked 5

V. Statement of the Case 7

VI. Argument 10

VII. Exhibits

Exhibit A
Memorandum Opinion of 3rd Circuit Court Judge Joseph Weiss

Exhibit B
Opinion and Memorandum Order of the District Court of Western Pennsylvania adopting Magistrate Judge's Recommendation, and Recommendation

Exhibit C
Verbatim Text of Applicable Statutes

Exhibit D
Letters of January 6, October 10, and November 6, 1986 from the Funds establishing contractural rights of Rishel

TABLE OF AUTHORITIES

CASES

Central States, Southeast & Southwest Areas Pension Funds v. Central Transport, Inc., 472 U.S. 559. .14

Firestone Tire and Rubber Company v. Bruch, 109 Sup. Ct. 948(1989) 12

NLRB v. Amax Coal Co., 453 U.S. 322 (1983) 14

Stoetzner v. U.S. Steel Corp., 897 F2nd 11 (1985) 10

STATUTES AND RULES

Rule 10 of the U.S.Supreme Court . 11

Employee Retirement Income Security Act of 1974, As amended (ERISA) 29U.S.C. Section 1132(e) et seq., . . 6, 12

Judicial Code 28 U.S.C. Sections 1331 and 1337 6

Judicial Code 28 U.S.C. Sections 1291 6

Judicial Code 28 U.S.C. Section 1254 7

III. OPINIONS OF OTHER COURTS

The official Memorandum Opinion which was rendered by Circuit Judge Joseph Weis on June 11, 1991, has not been published, but the same is attached hereto as Exhibit A. The Opinion of the District Court for the Western District of Pennsylvania is attached hereto as Exhibit B, which Opinion consists of a recommendation from Magistrate Judge Sensenich, which recommendation was adopted by the Honorable Glenn E. Mencer, District Judge.

IV. STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The jurisdiction of this Honorable Court is invoked on the basis of the following:

The Order herein was entered June 11, 1991, and no Petition for Rehearing was requested. The Complaint was filed in the U.S. District Court for the Western District of Pennsylvania under the Provisions of the Employee Retirement Income Security Act of 1974, as amended (ERISA) 29U.S.C. Section 1132(e) et seq., and pursuant to the United States Judicial Code 28 U.S.C. Sections 1331 and 1337. The District Court granted Summary Judgment dismissing the suit by Rishel and an appeal was taken to the Third Circuit Court of Appeals under 28 U.S.C. 1291. The jurisdiction of this Honorable Court

to entertain this Petition for Writ of Certiorari is set forth at 29 U.S.C. 1254. The verbatim text of the above statutes are set out as Attachment C.

V. STATEMENT OF THE CASE

The case herein involves the denial by the Respondent Funds to Rishel of a pension which he believes is available under the terms and provisions of a Collective Bargaining Agreement negotiated between the United Mine Workers of America and his employer, Wolfe & Wolfe. Rishel has the requisite years of service to qualify for a pension; his employer, Wolfe & Wolfe, was deemed a signatory to the Collective Bargaining Agreement which provides the pension; Rishel worked as a laborer and truck driver unloading rock dust for use in deep mines operated by U.S. Steel;no pension was accorded to Rishel. The Funds denied such pension on the basis that Wolfe & Wolfe and Rishel did not have sufficient contact with the

coal industry to warrant his being granted a pension. Rishel presented evidence that employees of another employer, Torrance Trucking, had performed identical work of and delivering and unloading rock dust to mines of the United States Steel Corporation. The Funds concluded, in denying a pension to Rishel, that the employees of Torrance Trucking were entitled to a pension because Torrance Trucking had a direct contract with a coal producing entity (U.S. Steel), while Wolfe & Wolfe had a contract with an intermediary (Martin Marietta), which in turn had the contract with United States Steel to deliver the rock dust for use in the deep coal mine.

The Trial Court and the Appellate Court accepted the determination of the

Funds that Rishel was not connected with the coal industry and concluded that the denial of a pension by the Funds was not an abuse of discretion or arbitrary or capricious. Stoetzner v. U.S. Steel Corp., 897 F2nd 11

VI. ARGUMENT

Rishel seeks review by this Honorable Court of the Opinion and Judgment entered in this Matter, on the basis that the denial of a pension to him by the Funds is arbitrary and capricious and an abuse of discretion and that the basis on which the Funds rely is a distinction without a difference. Pursuant to Rule 10 of the Rules of this Honorable Court, Rishel suggests that the ruling by the Circuit Court is one which is a departure from the accepted and usual course of judicial proceedings in that the Court has accepted at face value the reasons of the Funds which reasoning demonstrates arbitrary and capricious thought processes. Moreover, an important Federal question as to definition of the standard for review of

trustees actions after the Firestone Tire & Rubber Company v. Burch, 489 U.S. 101 (1989) case still needs to be decided and a standard for arbitrary and capricious conduct under ERISA needs to be articulated. The Fund's reasoning demonstrates arbitrary and capricious conduct. Rishel had qualified for a pension in terms of years of service and worked under a Collective Bargaining Agreement which provided for a pension and his employer was a signatory to the document that called for the pension. See Attachment D reflecting the Signatory status of Wolfe & Wolfe. Employees who worked side-by-side with Rishel for Torrance Trucking, unloading rock dust with them, were accorded a pension. The Funds argument that Rishel's employer did not have the requisite contact with the

coal industry, notwithstanding that the item unloaded was rock dust, which is an intimate part of the operation of a deep mine demonstrates a perverse rejection of the facts and/or a tortured analysis of them. One cannot reasonably say that Wolfe & Wolfe was not connected with the coal industry when it delivered material which is an intimate part of deep mining. The Funds theory of denial because Wolfe & Wolfe did not have a direct contract with the coal producer is an invalid distinction since the work performed was identical to the work performed by Torrance Trucking employees and was performed under the same agreements. The distinction drawn is an unfair one and we suggest it is based on the Funds failure to collect payments from Wolfe & Wolfe, rather than on the kind of work performed

See Exhibit D.

This Honorable Court has held that traditional trust concepts apply to ERISA claims; see Central States, Southeast & Southwest Areas Pension Funds v. Central Transport, Inc., 472 U.S. 559 (1985) and NLRB v. Amax Coal Co., 453 U.S. 322 (1983). We argue that the rationale for the denial of a pension to Rishel is contrary to trust concepts and this Honorable Court should hear the case so as to render substantial justice to Rishel and reject the illusory distinction on which the denial of a pension is based.

Respectfully submitted,

Timothy P. O'Reilly, Esq.
Counsel for Petitioner

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 91-3073

RALPH E. RISHEL,
Appellant

v.

UNITED MINE WORKERS OF AMERICA
HEALTH AND RETIREMENT FUNDS

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 88-01819)

District Judge:
Honorable Glenn E. Mencer

Submitted Pursuant to Third Circuit
Rule 12(6) June 4, 1991

Before: SLOVITER, Chief Judge ,
GREENBERG and WEIS, Circuit Judges.

Filed: Jun. 11, 1991

EXHIBIT A

MEMORANDUM OPINION OF THE COURT

WEIS, Circuit Judge.

Ralph Rishel was employed as a truck driver by Wolfe & Wolfe Trucking Company for many years. That company had a contract with Martin-Marietta to haul rock dust and other supplies from Martin-Marietta to coal mines that were signatories to collective bargaining agreements with the United Mine Workers. Wolfe & Wolfe was also a signatory to a contract with the UMW, and dues for the union were deducted from Rishel's wages.

Rishel applied to defendant UMW Retirement Funds for a pension. The Funds denied his request because Martin-Marietta was not a signatory to an agreement with the

UMW. He then bought this suit under the provisions of The Employee Retirement Income Security Act, 29 U.S.C. § 1000, et seq., as well as the Labor-Management Relations Act, 29 U.S.C. § 185(a)-

Thomas Caton, another driver for Wolfe & Wolfe, also was denied a pension by defendant UMW Funds. His similar suit has been consolidated with Rishel's because the issues are identical and the same result must obtain in both cases.

The district court granted summary judgment for defendant, concluding that the trustees did not act arbitrarily in denying a pension because Wolfe & Wolfe's connection with the coal mining industry was too tenuous. Rishel and Caton both appealed.

Rishel contends that defendant

Funds granted a pension to a truck driver employed by the Torrance Trucking Company who did similar work. Therefore, according to Rishel, Funds acted arbitrarily in refusing benefits to Wolfe & Wolfe employees. Defendant points out that Torrance had contracted with a UMW signatory, but Wolfe & Wolfe did not.

We have held that when a pension "plan contains provisions which give [] the administrator discretion in making eligibility determinations." courts will review those rulings under the "arbitrary and capricious standard." Stoetzner v. U. S. Steel Corp., 897 F. 2d 115, 119 (3d Cir. 1990). Cf. Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101 (1989). Here the pension documents provide that the trustees shall have the right to make the final determina-

tion on all issues concerning eligibility for benefits.

The Funds assert that the pension agreement provides credit for service as an employee of an employer in the coal industry. Wolfe & Wolfe is not considered to come within the definition of a coal industry employer because delivery to a company like Martin-Marietta is not a service to the coal industry.

The Funds also point out that Rishel has failed to recognize the difference between Torrance employees and his situation. Torrance had contracted directly with a signatory coal company; Wolfe & Wolfe did not. Rishel was denied a pension, not because of the nature of his work, but because Wolfe & Wolfe was not a coal industry employer.

The Funds have demonstrated a basis in the plan documents for the decision to exclude Rishel from pension benefits. In view of the substantial discretion granted to the trustees by both the plan and the law, we find no basis on which the district court could overturn the Funds' ruling.

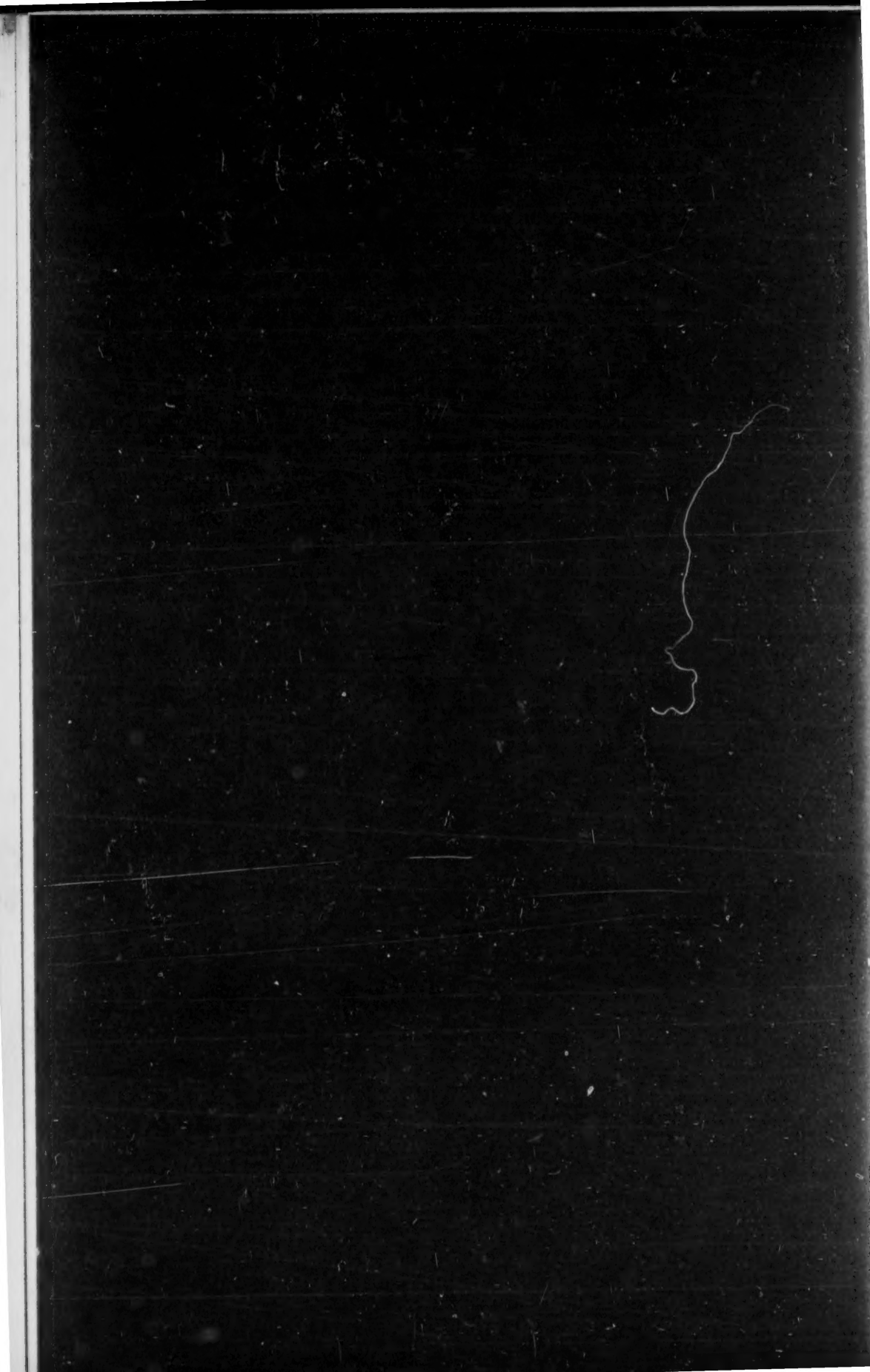
Accordingly we will affirm the judgment of the district court.

TO THE CLERK:

Please file the foregoing Opinion.

(s/d) Weis

Circuit Judge



IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RALPH E. RISHEL, Plaintiff	)	
vs.	)	Civil Action No. 88-1819
UNITED MINE WORKERS OF AMERICA HEALTH AND RETIREMENT FUNDS, Defendant	)	Judge Glenn E.Mencer/ Magistrate Sensenich

MEMORANDUM ORDER

On August 17, 1988, this case was referred to Chief United States Magistrate Ila Jeanne Sensenich for pretrial proceedings in accordance with the Magistrates Act, 28 U.S.C., Section 636(b)(1)(A) and (B), and Rules 3 and 4 of the Local Rules for Magistrates.

The magistrate's report and recommendation, filed on November 26, 1990,

EXHIBIT B-I

recommended that defendant's motion for summary judgment be granted. The parties were allowed ten (10) days from the date of service to file objections. Service was made on all parties and objections were filed by plaintiff on December 6, 1990. On December 20, 1990, defendant filed a response to the plaintiff's objections. After de novo review of the pleadings and documents in the case, together with the report and recommendation and objections thereto, the following order is entered:

AND NOW, this 8th day of January, 1991,

IT IS HEREBY ORDERED that defendant's motion for summary judgment is granted, and Judgment is entered in favor of the defendant and against the plaitiff.

The report and recommendation of Chief Magistrate Sensenich, dated November 26, 1990, is adopted as the opinion of the court.

(s/d) Glenn E. Mencer
GLENN E. MENCER
United States District Judge

cc: Ila Jeanne Sensenich
Chief U.S. Magistrate

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RALPH E. RISHEL, Plaintiff	)	
vs.	)	Civil Action No. 88-1819
UNITED MINE WORKERS OF AMERICA HEALTH AND RETIREMENT FUNDS, Defendant	)	Judge Glenn E. Mencer/ Magistrate Sensenich

MAGISTRATE'S REPORT AND RECOMMENDATION

I. RECOMMENDATION

It is recommended that defendant's motion for summary judgment be granted.

II. REPORT

Plaintiff brings this action pursuant to the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§1000, et seq., as amended, and also under the Labor-Management Relations Act, as

EXHIBIT B-II

amended, and Section 301, et seq., thereof, 29 U.S.C. §185(a), seeking payment of pension benefits. Defendant has filed a motion for summary judgment.

Ralph E. Rishel worked as a trucker for Wolfe & Wolfe Trucking Company (Wolfe & Wolfe) from March 1954 to May 1986. (See Pension File pp. L75).[1] While working for Wolfe & Wolfe, plaintiff delivered and unloaded rock dust for use in deep coal mines. Wolfe & Wolfe was a signatory to the 1978 and 1981 National Bituminous Coal Wage Agreements (NBCWA). Dues were deducted from plaintiff's wages pursuant to those agreements and remitted to the

1. Plaintiff's pension file is attached as Exhibit A to defendant's Memorandum of Points and Authorities in Support of defendant's Motion for Summary Judgment.

United Mine Workers Union. On March 20, 1985, he applied for a service pension from the United Mine Workers of America 1974 Pension Trust, based on his employment with Wolfe & Wolfe. (Pension File pp. R1-R4). The 1974 Pension Trust is one of five collectively bargained trusts collectively referred to as the UMWA Health and Retirement Funds. The 1974 Pension Trust was established under Article XX of the NBCWA of 1974 and in accordance with §302(c) of the Labor Management Realtions Act of 1947. Five trustees administer the 1974 Pension Trust and the other four collectively bargained trusts.[2] By letter dated June 28, 1985 the trustees denied plaintiff's

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2. See Article II of the 1974 Pension Trust. The 1974 Pension Trust is attached as Exhibit B to defendant's Memorandum of Points and Authrities in support of defendant's Motion for Summary Judgment.

application for a service pension. (Pension File p. R14). Plaintiff filed a request for a hearing to review the denial of his pension application. (Pension File p. L20). A hearing was held before defendant on May 24, 1988. By letter dated June 14, 1988, defendant informed plaintiff that his appeal for a service pension was denied. (Pension File p. L96).

The trustees decision to deny plaintiff a service pension was based on the following facts. While Wolfe & Wolfe was signatory to the 1978 and 1981 National Bituminous Coal Wage Agreements, it contracted with and was paid by Martin-Marietta Aggregates and Benwood Limestone, two non-signatory companies, to haul rock dust and other mine supplies to various signatory mines and to other businesses

that are not coal realted.[3] Article XX §(d) of the NBCWAs to which Wolfe & Wolfe was signatory require that employers make contributions to the 1974 Pension Trust for all classified work done by their employees and covered by the agreement. While Wolfe & Wolfe made the UMWA dues payments on behalf of its employees since 1977, it paid no royalty contributions to the 1974 Pension Trust on behalf of its employees (Pension File p. L8). Plaintiff argued that he should be entitled to a service pension since service pensions were awarded to employees of Torrance Trucking Company and the work he did was similar to the work of the employees of that company. The Trustees, however, noted that unlike Wolfe & Wolfe, Torrance Trucking Company contracted directly with signatory coal

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3. The 1978 and 1981 National Bituminous Coal Wage Agreements are Exhibits D and E of the defendant's Memorandum of Points and Authorities in support of defendant's Motion for Summary Judgment.

companies rather than with non-signatory suppliers such as Martin-Marietta Agfregates. Plaintiff filed the instant suit on August 16, 1988 against defendant alleging that its trustees had acted arbitrarily and capriciously in denying him a service pension based on his employment as a trucker for Wolfe & Wolfe. Defendant has moved for summary judgment on the grounds that the trustees' decision to deny plaintiff a service pension is neither arbitrary, capricious, nor an abuse of discretion and is based on substantial evidence.

The first issue to consider is whether this court should use a de novo or arbitrary and capricious standard to review the trustees' decision. Historically, the review of a trustee's decision was limited to a determination as to whether

it was arbitrary and capricious. Gaines v. Amalgamated Insurance Fund, 753 F.2d 288, 289 (3d Cir. 1985). However in the recent case of Firestone Tire and Rubber Company v Bruch, 489 U.S. 101, 109 S.Ct. 948 (1989), the Supreme Court held that a denial of benefits under ERISA "is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." 489 U.S. at 115, 109 S.Ct. at 956.

In this case the trustees' decision should be reviewed under an arbitrary and capricious standard since the benefit plan gives the administrator discretionary authority to determine eligibility for benefits.[4] Article VIII A

4. The 1974 Pension Plan is attached as Exhibit G to defendant's Memorandum of Points and Authorities in support of defendant's Motion for Summary Judgment.

of the 1974 Pension Plan provides that "[t]he Trustees or such other named fiduciaries as may be properly designated shall have full and final determination as to all issues concerning eligibility for benefits." Article VIII B (1) of the Plan provides that "[t]he Trustees are authorized to promulgate rules and regulations to implement this Plan, and those rules and regulations shall be binding upon all persons dealing with and Participants claiming benefits under this Plan." The language of these two sections appears to give the trustees discretionary authority to determine eligibility for benefits. Therefore, the trustees' decision should be reviewed under an arbitrary and capricious standard as provided in the Firestonecase. In the case of Byd v. Trustees of the UMWA Health

& Retirement Funds, 873 F.2d 57, 59 (4th Cir. 1989),the Court of Appeals for the Fourth Circuit reviewed the same PensionPlanand determined that it conferred such discretionary authority on the trustees that a denial of benefits must be reviewed under an abuse of discretion standard. Plaintiff cites an August 3, 1989 decision of the Honorable Donald E. Ziegler in the case of UMWA International Union v. Nobel, et al., 720 F.Supp. 1169 (W.D. Pa. 1989),as support for his position that the review should be de novo. In that case Judge Ziegler was considering the 1974 Benefit Plan, not the 1974 Pension Plan in this case. Since the 1974 Benefit Plan does not give the trustees the discretinary authority given in the 1974 PensionPlan Nobel is not relevant to this case.

As mentioned previously,the trustees denied plaintiff a service pension based on the fact that Wolfe & Wolfe, which was signatory to the 1978 and 1981 National Bituminous coal Wage Agreements, had contracted with and was paid by Martin-Marietta Aggregates and Benwood Limestone, two non-signatory companies, to haul rock dust and other supplies to various signatory mines and to other businesses that are not coal related. Review of the 1974 PensionPlanand the National Bituminous Coal Wage Agreements indicated that the trustees' decision to deny plaintiff a service pension was not arbitrary and capricious. Article IV of the 1974 Pension Planprescribes when an employee is to be credited withservice pursuant to the pension plan for

workperformed by the employee. Sections A and B of Article IV provide when an employee will receive credit under the pension plan for non-signatory service and signatory service. In each instance the relevant employment must be classified employmentin the coal industry. The 1974 Pension Plandoesnot define classified employment in the coal industry, however the NBCWAs in effect when plaintiff was employed by Wolfe & Wolfe provides that the "work jurisdiction" of those agreements were as follows:

> The production of coal. . . preparation, processing and cleaning of coal and transportation of coal . . . repair and maintenance work normally performed at the mine site or at acentral shop of the Employer. . . and work customarily related to all of the above.

Article II Section (a) of the NBCWA of 1974; Article I.A Section (a) of the

NBCWAs of 1978 and 1981. While, for the purposes of the instant motion, defendant admits that the workplaintiff performed could be "customarily related to" maintenance, defendant argues that the trustees were correct in determining that Wolfe & Wolfe's relationship with the coal industry was too tenuous to allow plaintiff to qualify for coverage under the work jurisdictionclauses of the NBCWAs.

Plaintiff argues that he should be entitled to a service pension since the employees of Torrance Trucking Company were awardedpensions and the work he did was similar to theirs. Defendant does not dispute, for purposes of this motion,that the work performed by plaintiff was similar to the work performed bythe

employees of Torrance Trucking Company. It argues that employees of Torrance Truckng Company are entitled to pensions since that company contracted directly withsignatory coal companies rather than with non-signatory suppliers with which Wolfe & Wolfe contracted. Plaintiff has presented no evidence to refute either defendant's assertion that Torrance Trucking Company contracted withsignatory coalcompanies or its assertion that Wolfe & Wolfe contracted withnon-signatory companies.

Defendant also points out that Article VIII B.(1) of the 1974 PensionPlangrants the trustees of the 1974 Pension Trust the authority to "promulgate rulesand regulations to implement this Plan,and those rules and regulations shall

be binding upon all persons dealing withand Participants claiming benefits under this Plan." It states that as a result of this authority it has developeda series of Questions and Answers, commonly referred to as "Q&As", to interpretand implement the 1974 Pension Plan. (Affidavit of Doald R. Remsch, defendant's Exhibit C). Defendant argues that Q&A 60 supports supports the position that the trustees did not act arhbitrarily or capriciously when it denied plaintiff's application for a service pension. Q&A 60 provides that an employee of a signatory trucking company qualifies for pension credit while hauling mine refuse from the tipple to the slate dump for a signatory coal company. Defendant argues that by implication, if the signatory trucking company had been hauling for

someone other than a signatory coal company no pension credit would accrue. Defendant points out that the distinctin between whether an employee works for a signatory trucking company that contracts with a signatory coal comnpany or a non-signatory supplier reflects an important institutional concern of the pension fund, that is, employer contributions underwrite the benefits that the pension fund must provide. Defendant admits, however, that it has the ultimate responsibility to assess employer contributions to the fund and the lack of an employer contribution on behalf of an employee can not be the basis for denying a service pension. Wolfe & Wolfe was not assessed for employer contributions because defendant was not assessed for employer contributions because defendant determined

that it ws not a coal industry employer because of its contractual relationships with non-signatory suppliers.

The trustees' decision to deny plaintiff's application for a service pension based on their determination that Wolfe & Wolfe was not a coal industry employer was not arbitrary or capricious. Plaintiff's argument that the decision was arbitrary and capricious since the Torrance Trucking Company employees were granted service pensions for doing the same type of work is not persuasive. The trustees' determinatin that plaintiff's relationship with the coal industry was too removed and that plaintiff was not engaged in classified employment in the coal industry as required by Article IV of the 1974 Pension Plan was not arbitrary

and capricious. While it is unfortunate that plaintiff cannot get the pension he expected to receive, the decision of the trustees is not arbitrary and capricious and therefore defendant's motion for summary judgment should be granted.

In accordance with the Magistrates Act, 28 U.S.C. Section 636(B)(1) (B) and (C), and Rule 4 of the Local Rules for Magistrates, the parties are allowed ten (10) days from the date of service to file objections to this report and recommendation.

Ila Jeanne Sensenich
Chief U.S. Magistrate

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

THOMAS P. CATON, Plaintiff	)
vs.	) Civil Action) No. 88-1820) Judge Glenn E. Mencer/
UNITED MINE WORKERS OF AMERICA HEALTH AND RETIREMENT FUNDS, Defendant	) Magistrate Sensenich)

MEMORANDUM ORDER

On August 17, 1988, this case was referred to Chief United States Magistrate Ila Jeanne Sensenich for pretrial proceedings in accordance with the Magistrates Act, 28 U.S.C., Section 636(b)(1)(A) and (B), and Rules 3 and 4 of the Local Rules for Magistrates.

The Magistrate's report and recommendation, filed on November 26, 1990,

EXHIBIT B-III

recommended that defendant's motion for summary judgment be granted. The parties were allowed ten (10) days from the date of service to file objections. Service was made on all parties and objections were filed by plaintiff on December 6, 1990. On December 20, 1990, defendant filed a response to the plaintiff's objections. After de novo review of the pleadings and documents in the case, together with the report and recommendation and objections thereto, the following order is entered:

AND NOW, this 8th day of January, 1991,

IT IS HEREBY ORDERED that defendant's motion for summary judgment is granted, and Judgment is entered in favor of the defendant and against the plaitiff.

The report and recommendation of Chief Magistrate Sensenich, dated November 26, 1990, is adopted as the opinion of the court.

(s/d) Glenn E. Mencer
GLENN E. MENCER
United States District Judge

cc: Ila Jeanne Sensenich
Chief U.S. Magistrate

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

THOMAS P. CATON, Plaintiff	)
vs.	) Civil Action) No. 88-1820) Judge Glenn E. Mencer,) Magistrate Sensenich
UNITED MINE WORKERS OF AMERICA HEALTH AND RETIREMENT FUNDS, Defendant	)

MAGISTRATE'S REPORT AND RECOMMENDATION

I. RECOMMENDATION

It is recommended that defendant's motion for summary judgment be granted.

II. REPORT

Plaintiff brings this action pursuant to the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1000, et seq., as amended, and also under the Labor-Management Relations Act, as

EXHIBIT B-IV

amended, and Section 301, et seq., thereof, 29 U.S.C. §185(a), seeking payment of pension benefits. Defendant has filed a motion for summary judgment.

Thomas P. Caton worked as a trucker for Wolfe & Wolfe Trucking Company (Wolfe & Wolfe) from March 1954 to May 1986. (See Pension File pp. L75).[1] While working for Wolfe & Wolfe, plaintiff delivered and unloaded rock dust for use in deep coal mines. Wolfe & Wolfe was a signatory to the 1978 and 1981 National Bituminous Coal Wage Agreements (NBCWA). Dues were deducted from plaintiff's wages pursuant to those agreements and remitted to the

1. Plaintiff's pension file is attached as Exhibit A to defendant's Memorandum of Points and Authorities in Support of defendant's Motion for Summary Judgment.

United Mine Workers Union. On March 20, 1985, he applied for a service pension from the United Mine Workers of America 1974 Pension Trust, based on his employment with Wolfe & Wolfe. (Pension File pp. R1-R4). The 1974 Pension Trust is one of five collectively bargained trusts collectively referred to as the UMWA Health and Retirement Funds. The 1974 Pension Trust was established under Article XX of the NBCWA of 1974 and in accordance with §302(c) of the Labor Management Realtions Act of 1947. Five trustees administer the 1974 Pension Trust and the other four collectively bargained trusts.[2] By letter dated June 28, 1985 the trustees denied plaintiff's

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2. See Article II of the 1974 Pension Trust. The 1974 Pension Trust is attached as Exhibit B to defendant's Memorandum of Points and Authrities in support of defendant's Motion for Summary Judgment.

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The trustees decision to deny plaintiff a service pension was based on the following facts. While Wolfe & Wolfe was signatory to the 1978 and 1981 National Bituminous Coal Wage Agreements, it contracted with and was paid by Martin-Marietta Aggregates and Benwood Limestone, two non-signatory companies, to haul rock dust and other mine supplies to various signatory mines and to other businesses

that are not coal realted.[3] Article XX §(d) of the NBCWAs to which Wolfe & Wolfe was signatory require that employers make contributions to the 1974 Pension Trust for all classified work done by their employees and covered by the agreement. While Wolfe & Wolfe made the UMWA dues payments on behalf of its employees since 1977, it paid no royalty contributions to the 1974 Pension Trust on behalf of its employees (Pension File p. L8). Plaintiff argued that he should be entitled to a service pension since service pensions were awarded to employees of Torrance Trucking Company and the work he did was similar to the work of the employees of that company. The Trustees, however, noted that unlike Wolfe & Wolfe, Torrance Trucking Company contracted directly with signatory coal

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3. The 1978 and 1981 National Bituminous Coal Wage Agreements are Exhibits D and E of the defendant's Memorandum of Points and Authorities in support of defendant's Motion for Summary Judgment.

companies rather than with non-signatory suppliers such as Martin-Marietta Agfregates. Plaintiff filed the instant suit on August 16, 1988 against defendant alleging that its trustees had acted arbitrarily and capriciously in denying him a service pension based on his employment as a trucker for Wolfe & Wolfe. Defendant has moved for summary judgment on the grounds that the trustees' decision to deny plaintiff a service pension is neither arbitrary, capricious, nor an abuse of discretion and is based on substantial evidence.

The first issue to consider is whether this court should use a de novo or arbitrary and capricious standard to review the trustees' decision. Historically, the review of a trustee's decision was limited to a determination as to whether

it was arbitrary and capricious. Gaines v. Amalgamated Insurance Fund, 753 F.2d 288, 289 (3d Cir. 1985). However in the recent case of Firestone Tire and Rubber Company v Bruch, 489 U.S. 101, 109 S.Ct. 948 (1989), the Supreme Court held that a denial of benefits under ERISA "is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." 489 U.S. at 115, 109 S.Ct. at 956.

In this case the trustees' decision should be reviewed under an arbitrary and capricious standard since the benefit plan gives the administrator discretionary authority to determine eligibility for benefits.[4] Article VIII A

4. The 1974 Pension Plan is attached as Exhibit G to defendant's Memorandum of Points and Authorities in support of defendant's Motion for Summary Judgment.

of the 1974 Pension Plan provides that "[t]he Trustees or such other named fiduciaries as may be properly designated shall have full and final determination as to all issues concerning eligibility for benefits." Article VIII B (1) of the Plan provides that "[t]he Trustees are authorized to promulgate rules and regulations to implement this Plan, and those rules and regulations shall be binding upon all persons dealing with and Participants claiming benefits under this Plan." The language of these two sections appears to give the trustees discretionary authority to determine eligibility for benefits. Therefore, the trustees' decision should be reviewed under an arbitrary and capricious standard as provided in the Firestonecase. In the case of Byd v. Trustees of the UMWA Health

& Retirement Funds, 873 F.2d 57, 59 (4th Cir. 1989),the Court of Appeals for the Fourth Circuit reviewed the same PensionPlanand determined that it conferred such discretionary authority on the trustees that a denial of benefits must be reviewed under an abuse of discretion standard. Plaintiff cites an August 3, 1989 decision of the Honorable Donald E. Ziegler in the case of UMWA International Union v. Nobel, et al., 720 F.Supp. 1169 (W.D. Pa. 1989),as support for his position that the review should be de novo. In that case Judge Ziegler was considering the 1974 Benefit Plan, not the 1974 Pension Plan in this case. Since the 1974 Benefit Plan does not give the trustees the discretinary authority given in the 1974 PensionPlan Nobel is not relevant to this case.

As mentioned previously,the trustees denied plaintiff a service pension based on the fact that Wolfe & Wolfe, which was signatory to the 1978 and 1981 National Bituminous coal Wage Agreements, had contracted with and was paid by Martin-Marietta Aggregates and Benwood Limestone, two non-signatory companies, to haul rock dust and other supplies to various signatory mines and to other businesses that are not coal related. Review of the 1974 PensionPlanand the National Bituminous Coal Wage Agreements indicated that the trustees' decision to deny plaintiff a service pension was not arbitrary and capricious. Article IV of the 1974 Pension Planprescribes when an employee is to be credited withservice pursuant to the pension plan for

workperformed by the employee. Sections A and B of Article IV provide when an employee will receive credit under the pension plan for non-signatory service and signatory service. In each instance the relevant employment must be classified employmentin the coal industry. The 1974 Pension Plandoesnot define classified employment in the coal industry, however the NBCWAs in effect when plaintiff was employed by Wolfe & Wolfe provides that the "work jurisdiction" of those agreements were as follows:

> The production of coal. . . preparation, processing and cleaning of coal and transportation of coal . . . repair and maintenance work normally performed at the mine site or at acentral shop of the Employer. . . and work customarily related to all of the above.

Article II Section (a) of the NBCWA of 1974; Article I.A Section (a) of the

NBCWAs of 1978 and 1981. While, for the purposes of the instant motion, defendant admits that the workplaintiff performed could be "customarily related to" maintenance, defendant argues that the trustees were correct in determining that Wolfe & Wolfe's relationship with the coal industry was too tenuous to allow plaintiff to qualify for coverage under the work jurisdictionclauses of the NBCWAs.

Plaintiff argues that he should be entitled to a service pension since the employees of Torrance Trucking Company were awardedpensions and the work he did was similar to theirs. Defendant does not dispute, for purposes of this motion,that the work performed by plaintiff was similar to the work performed bythe

employees of Torrance Trucking Company. It argues that employees of Torrance Truckng Company are entitled to pensions since that company contracted directly withsignatory coal companies rather than with non-signatory suppliers with which Wolfe & Wolfe contracted. Plaintiff has presented no evidence to refute either defendant's assertion that Torrance Trucking Company contracted withsignatory coalcompanies or its assertion that Wolfe & Wolfe contracted withnon-signatory companies.

Defendant also points out that Article VIII B.(1) of the 1974 PensionPlangrants the trustees of the 1974 Pension Trust the authority to "promulgate rulesand regulations to implement this Plan,and those rules and regulations shall

be binding upon all persons dealing withand Participants claiming benefits under this Plan." It states that as a result of this authority it has developeda series of Questions and Answers, commonly referred to as "Q&As", to interpretand implement the 1974 Pension Plan. (Affidavit of Doald R. Remsch, defendant's Exhibit C). Defendant argues that Q&A 60 supports supports the position that the trustees did not act arhbitrarily or capriciously when it denied plaintiff's application for a service pension. Q&A 60 provides that an employee of a signatory trucking company qualifies for pension credit while hauling mine refuse from the tipple to the slate dump for a signatory coal company. Defendant argues that by implication, if the signatory trucking company had been hauling for

someone other than a signatory coal company no pension credit would accrue. Defendant points out that the distinctin between whether an employee works for a signatory trucking company that contracts with a signatory coal comnpany or a non-signatory supplier reflects an important institutional concern of the pension fund, that is, employer contributions underwrite the benefits that the pension fund must provide. Defendant admits, however, that it has the ultimate responsibility to assess employer contributions to the fund and the lack of an employer contribution on behalf of an employee can not be the basis for denying a service pension. Wolfe & Wolfe was not assessed for employer contributions because defendant was not assessed for employer contributions because defendant determined

that it ws not a coal industry employer because of its contractual relationships with non-signatory suppliers.

The trustees' decision to deny plaintiff's application for a service pension based on their determination that Wolfe & Wolfe was not a coal industry employer was not arbitrary or capricious. Plaintiff's argument that the decision was arbitrary and capricious since the Torrance Trucking Company employees were granted service pensions for doing the same type of work is not persuasive. The trustees' determinatin that plaintiff's relationship with the coal industry was too removed and that plaintiff was not engaged in classified employment in the coal industry as required by Article IV of the 1974 Pension Plan was not arbitrary

and capricious. While it is unfortunate that plaintiff cannot get the pension he expected to receive, the decision of the trustees is not arbitrary and capricious and therefore defendant's motion for summary judgment should be granted.

In accordance with the Magistrates Act, 28 U.S.C. Section 636(B)(1) (B) and (C), and Rule 4 of the Local Rules for Magistrates, the parties are allowed ten (10) days from the date of service to file objections to this report and recommendation.

Ila Jeanne Sensenich
Chief U.S. Magistrate

Basis of Jurisdiction before the Supreme Court

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree (28 U.S.C. Section 1254).

Basis of Jurisdiction before the 3rd District Court of Appeals

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court (28 U.S.C. Section 1291).

Basis of Jurisdiction before the

EXHIBIT C

U.S. District Court of Western Pennsylvania

The district courts shall have original jurisdiction of any civil action or proceedings arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies (28 U.S.C. Section 1337).

Basis of Jurisdiction in ERISA

A civil action may be brought . . .

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan; (29 U.S.C. Section 1132).

UMWA HEALTH AND RETIREMENT FUNDS
2021 K Street NW · Washington, DC 20006 ·
Telephone: (202)452-5000

January 6, 1986

Wolfe & Wolfe, Inc.
William Paull, Jr., President
P. O. Box 1293
Uniontown, Pennsylvania 15401

Gentlemen:

An examination of your records by Funds' accountants was recently conducted to determine if contributions were due on classified hours worked by employees of your company.

It was determined that there were no classified hours worked by employees of your firm and consequently no contributions were due the Funds.

We sish to thank you for your cooperation in this matter.

Sincerely,

(s/d) Donald G. Craft

Donald G. Craft
Audit Manager

DGC/zgb

cc: District No. 4, U.M.W.A.
Johnstown Accountants

United Mine Workers of
America Health and Retirement Funds

INTER-OFFICE CORRESPONDENCE

Date: October 10, 1986

To: Kyu Lee, Eligibility Services

(s/d) Richard K. Robinson
From: Richard K. Robinson,
Assistant Field Service Director,
Through Betty Veach, Director,
Morgantown FSO

Subject: Response to Attorney

As discussed today, release forms have been received from Mr. Timothy O'Reilly, Attorney, RE:

Rishel, Ralph E.	189 22 6819
Caton, Thomas P.	181 14 7030

Their case files are enclosed, both applications were denied primarily because the trucker's contract was with a non-coal industry company, Martin-Marietta aggregates.

However, the manual (253.312blc) indicates that a person can work for a non-mining business and still meet the requirements for work in a classified job. Thus, although Funds audit manager, Mr. Donald Craft (letter

in enclosed files) could determine no classified hours, it is still unclear whether or not the job was classified.

Because of the potential, and threat of a class action suit, a response to Mr. O'Reilly will be held pending your review and advise.

Thank you,

RR:bam

Attachments

UMWA HEALTH AND RETIREMENT FUNDS
3461 University Avenue ·
Morgantown, West Virginia 26505
Telephone: (304) 599-3321

TOLL FREE #
1-800-654-9766

November 6, 1986

Mr. Timothy C. O'Reilly
Attorney at Law
1901 Law and Finance Building
Pittsburgh PA 15219

Dear Mr. O'Reilly:

In response to your December 10, 1985 correspondence to Ms. Betty Veach regarding Ralph Rishel and Tom Caton, the following is provided:

1) Both Mr. Rishel and Mr. Caton worked for Wolfe and Wolfe which can apparently be considered a party signatory to the Coal Wage Agreement.

2) Wolfe and Wolfe, however, did not contract with a signatory coal company for the hauling they performed. Instead, their contract was with a non-coal industry company, Martin-Marietta Aggregates, to haul rock dust.

3) Thus, work performed by both Mr. Rishel and Mr. Caton was outside the coal industry. That is, no direct employer-employee relationship with a signatory coal company could be established. This means that their work was non-classified and could not be used for pension credit.

We appreciate your patience while microfiche records were being obtained from our files. We hope that the above information will clarify why no pensions were awarded to either Mr. Rishel or to Mr. Caton. However, if questions remain, then please contact us.

Respectfully,

(s/d) Richard K. Robinson

Richard K. Robinson
Assistant Director
Morgantown Field Service Office

RKR/dkk

CERTIFICATE OF BAR MEMBERSHIP

I, Timothy P. O'Reilly, hereby certify that I am admitted to practice before the Supreme Court of the United States.

Timothy P. O'Reilly

1805 Law & Finance Bldg
Pittsburgh, PA 15219

(412) 566-1717

(2)

No. 91-710

Supreme Court, U.S.
FILED
NOV 26 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

RALPH E. RISHEL, consolidated with
THOMAS P. CATON,
Petitioners,

v.

UNITED MINE WORKERS OF AMERICA
HEALTH AND RETIREMENT FUNDS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF IN OPPOSITION OF UNITED MINE WORKERS OF AMERICA HEALTH AND RETIREMENT FUNDS

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Dated: November 26, 1991 * Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals erred in affirming summary judgment for the United Mine Workers of America Health and Retirement Funds, on the ground that the Funds' decision to deny the pension application of Ralph E. Rishel was neither arbitrary nor capricious.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iv
CITATIONS OF OPINIONS AND JUDGMENTS ISSUED	vi
COUNTER-STATEMENT OF THE CASE	1
Statement of Proceedings	1
Statement of the Facts	2
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. THE STANDARD OF REVIEW PRESENTS NO ISSUE WORTHY OF THIS COURT'S REVIEW	5
A. A Deferential Standard Is Applicable in This Case	5
B. Rishel Cannot Now Allege that the "Arbitrary and Capricious" Standard Is Not the Appropriate Deferential Standard	7
C. The "Arbitrary and Capricious" Standard Has Been Sufficiently "Articulated"	9
II. THE DENIAL OF RISHEL'S PENSION APPLICATION WAS NOT ARBITRARY AND CAPRICIOUS	12
CONCLUSION	16

TABLE OF AUTHORITIES

CASES	Page
Anderson v. Blue Cross/Blue Shield of Alabama, 907 F.2d 1072 (11th Cir. 1990)	11
Baker v. UMWA Health and Retirement Funds, 929 F.2d 1140 (6th Cir. 1991)	6, 11
Batchelor v. International Brotherhood of Elec. Workers Local 861 Pension and Retirement Fund, 877 F.2d 441 (5th Cir. 1989)	10
Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 42 L.Ed.2d 447, 95 S.Ct. 438 (1974)	10
Boyd v. Trustees of the UMWA Health and Retirement Funds, 873 F.2d 57 (4th Cir. 1989)	6
California v. Taylor, et al., 353 U.S. 553, 1 L.Ed.2d 1034, 77 S.Ct. 1037 (1957)	8
Curtis v. Noel, 877 F.2d 159 (1st Cir. 1989)	10
Duignan v. United States, 274 U.S. 195, 71 L.Ed. 996, 47 S.Ct. 566 (1927)	8, 9
Federal Communications Commission v. National Citizens Committee for Broadcasting, 436 U.S. 775, 56 L.Ed.2d 697, 98 S.Ct. 2096 (1978)	10
Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 103 L.Ed.2d 80, 109 S.Ct. 948 (1989)	4, 5, 6, 7, 10
Gaines v. Amalgamated Insurance Fund, 753 F.2d 288 (3d Cir. 1985)	5
Glidden Co. v. Zdanok, et al., 370 U.S. 530, 8 L.Ed.2d 671, 82 S.Ct. 1459 (1962)	9
Guy v. Southeastern Iron Workers' Welfare Fund, 877 F.2d 37 (11th Cir. 1989)	10, 11
Johnson v. Trustees of Western Conf. of Teamsters Pension Trust Fund, 879 F.2d 651 (9th Cir. 1989)	10
Jordan v. Cameron Iron Works, Inc. et al., 900 F.2d 53 (5th Cir. 1990), *cert. denied*, 112 L.Ed.2d 308, 111 S.Ct. 344 (1990)	11
Lister v. Stark, 942 F.2d 1183 (7th Cir. 1991)	11
Miller v. Metropolitan Life Insurance Company, 925 F.2d 979 (6th Cir. 1991)	10, 11

TABLE OF AUTHORITIES—Continued

Page

Oldenburger v. Central States Southeast and Southwest Areas Teamster Pension Fund, et al., 934 F.2d 171 (8th Cir. 1991) 10, 11

Rosen v. Hotel and Restaurant Employees and Bartenders Union, 637 F.2d 592 (3d Cir.), *cert. denied*, 454 U.S. 898, 70 L.Ed.2d 213, 102 S.Ct. 398 (1981) 5

Saracco v. Local Union 286 Pension Fund, 942 F.2d 1213 (7th Cir. 1991) 10

Singleton v. Wulff, 428 U.S. 106, 49 L.Ed.2d 826, 96 S.Ct. 2868 (1976) 8

Stoetzner v. U.S. Steel Corp., 897 F.2d 115 (3d Cir. 1990) 6

UMWA Health and Retirement Funds v. Robinson, 455 U.S. 562, 71 L.Ed.2d 419, 102 S.Ct. 1226 (1982) 2, 3, 5, 6

United States v. Donnelly, 397 U.S. 286, 25 L.Ed.2d 312, 90 S.Ct. 1033 (1970) 8

Wolf v. National Shopmen Pension Fund, 728 F.2d 182 (3d Cir. 1984) 5, 10

Woolsey v. Marion Laboratories, Inc., 934 F.2d 1452 (10th Cir. 1991) 10, 11

Youakim v. Miller, 425 U.S. 231, 47 L.Ed.2d 701, 96 S.Ct. 1399 (1976) 9

STATUTES

Employee Retirement Income Security Act of 1974, *as amended*, 29 U.S.C. § 1001 *et seq.* (1985 & Supp. 1990)

§ 404(a), 29 U.S.C. § 1104(a) 5, 6

§ 502, 29 U.S.C. § 1132 4

Labor Management Relations Act of 1947, *as amended*, 29 U.S.C. § 185 *et seq.* (1985 & Supp. 1990)

§ 301, 29 U.S.C. § 185 4

§ 302, 29 U.S.C. § 186 ..... 2, 6

OTHER MATERIALS

Comment, *The Arbitrary and Capricious Standard Under ERISA: Its Origins and Applications*, 23 Duquesne L. Rev. 1033 (1985) 9

CITATIONS OF OPINIONS AND JUDGMENTS ISSUED

Rishel v. UMWA Health and Retirement Funds, No. 91-3073 (3rd Cir. June 11, 1991) (Judgment Affirming District Court)

Rishel v. UMWA Health and Retirement Funds, C.A. No. 88-1819 (W.D.Pa. Jan. 8, 1991) (Order Granting Funds' Motion for Summary Judgment and Adopting Magistrate's Report)

Rishel v. UMWA Health and Retirement Funds, C.A. No. 88-1819 (W.D. Pa. Nov. 26, 1990) (Magistrate's Report and Recommendation)

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Caton v. UMWA Health and Retirement Funds, C.A. No. 88-1820 (W.D. Pa. Nov. 26, 1990) (Magistrate's Report and Recommendation)

IN THE

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF IN OPPOSITION OF UNITED MINE WORKERS OF AMERICA HEALTH AND RETIREMENT FUNDS

COUNTER-STATEMENT OF THE CASE

Statement of Proceedings

On or about August 16, 1988, the Petitioners, Ralph E. Rishel and Thomas P. Caton, filed separate actions in the United States District Court for the Western District of Pennsylvania alleging that the Respondent, the United Mine Workers of America Health and Retirement Funds,[1]

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[1] The "United Mine Workers of America Health and Retirement Funds" ("Funds") is the collective name for five irrevocable employee benefit trusts established under Article XX of the National Bituminous Coal Wage Agreement ("NBCWA") in accordance with Section 302(c) of the Labor-Management Relations Act of

had arbitrarily and capriciously denied their pension applications. (App. pp. 5a-8a.)[2] By Answers filed September 23, 1988, the Funds denied that Rishel and Caton are eligible for a service pension. (App. pp. 29a-32a.)

Rishel's action was assigned to Judge Mencer, and Caton's action was assigned to Judge McCune. By Orders dated August 17, 1988, Judges Mencer and McCune referred these actions to Magistrate Sensanich. The Funds subsequently filed cross-motions for summary judgment with Rishel and Caton. (App. pp. 347a-349a). By Report and Recommendation dated November 26, 1990, the Magistrate recommended granting the Funds' Motion for Summary Judgment. (App. pp. 480a-488a.). By Memorandum Order dated January 8, 1991, Judge Mencer adopted the Magistrate's recommendation. (App. pp. 497a-498a.) By Memorandum Order dated January 31, 1991, Judge McCune adopted the Magistrate's recommendation. Appeals to the Court of Appeals for the Third Circuit were noted by Rishel and Caton on February 4, 1991. (App. p. 1a.) These appeals were subsequently consolidated on March 19, 1991 and the Third Circuit affirmed the judgment of the District Court by opinion filed June 11, 1991. The pertinent facts underlying Rishel and Caton's situations are identical; consequently, only Rishel's situation is discussed herein.

Statement of the Facts

Ralph E. Rishel worked as a trucker for Wolfe & Wolfe Trucking Company ("Wolfe & Wolfe") from March 1954 to May 1984. (App. p. 458a.)[3] On or about March 20,

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1947, 29 U.S.C. § 186(c). *UMWA Health and Retirement Funds v. Robinson*, 455 U.S. 562, 566 (1982).

[2] References to the Joint Appendix filed in the Court of Appeals will be cited as "App. p. ——."

[3] Thomas P. Caton worked as a trucker for Wolfe & Wolfe from July 15, 1973 to February 15, 1983. *See* Caton's Pension File, pp. ———.

1985, Rishel applied to the UMWA 1974 Pension Trust ("1974 Pension Trust")[4] for a service pension based on his employment with Wolfe & Wolfe. (App. pp. 456a-459a.) The Trustees of the 1974 Pension Trust subsequently notified Rishel that his application for a service pension had been denied. (App. p. 446a.) The Trustees based this denial on the following facts and analysis:

Wolfe & Wolfe was a trucking company. It contracted with Martin-Marietta Aggregates ("Martin-Marietta") and Benwood Limestone to, *inter alia*, haul supplies, including rock dust, from Martin-Marietta and Benwood Limestone to various businesses, including signatory coal mines and other businesess outside the coal industry. (App. pp. 367a, 398a.)[5] Articles IV.A(1) and B (1)(a) of the UMWA 1974 Pension Plan ("1974 Pension Plan"), the document that contains the eligibility criteria for the 1974 Pension Trust, state that credit shall be given towards a service pension only for employment "for an employer in the coal industry . . ." (App. pp. 405a-406a.) Because Wolfe & Wolfe was not a "coal industry employer," the Trustees were required to deny Rishel's service pension application. (App. p. 446a.)

R2, R4. (A copy of Caton's Pension File is attached to Defendants' Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment in C.A. No. 88-1820 as Exhibit A.)

[4] The 1974 Pension Trust is one of the five separate collectively bargained trusts collectively referred to as the "Funds." *See UMWA Health and Retirement Funds v. Robinson*, 455 U.S. 562, 563-66 (1982).

[5] Wolfe & Wolfe was signatory to the National Bituminous Coal Wage Agreement (App. p. 431). It, therefore, automatically deducted union dues from Rishel's paycheck to be sent to the UMWA. (App. p. 430a.) The UMWA, which is one of the two settlors of the five trusts that comprise the Funds, is separate and distinct from the Funds. Dues that the UMWA receives on behalf of classified employees in no way affect any of the five trusts that collectively comprise the Funds.

Rishel subsequently filed this action pursuant to Section 502 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132, and Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, alleging that the Trustees of the 1974 Pension Trust had acted arbitrarily and capriciously in denying his service pension application. (App. pp. 5a-8a.)

SUMMARY OF ARGUMENT

(1) Under this Court's decision in *Firestone Tire & Rubber Co. v. Bruch*, 455 U.S. 562 (1982), a deferential review of Rishel's pension denial is appropriate because the Trustees have been granted the discretion to determine benefit eligibility. (2) Because he did not raise the issue below and cannot establish that his is an "exceptional case," Rishel may not now assert that the lower court did not apply the proper deferential standard. (3) The well settled arbitrary and capricious standard does not require elaboration by this Court. (4) The lower courts properly determined that the Trustees were not arbitrary and capricious in concluding that Rishel's employer was not a coal industry employer within the meaning of the UMWA 1974 Pension Plan, and that Rishel was therefore ineligible for benefits from that Plan.

ARGUMENT

I. THE STANDARD OF REVIEW PRESENTS NO ISSUE WORTHY OF THIS COURT'S REVIEW

A. A Deferential Standard Is Applicable in This Case

The trustees of an employee pension plan, such as the 1974 Pension Plan, have a fiduciary obligation to administer that plan in accordance with the governing plan documents and to pay benefits only to eligible participants. 29 U.S.C. § 1104(a)(1)(D). *See UMWA Health and Retirement Funds v. Robinson*, 455 U.S. 562, 573-74 (1982). Traditionally, judicial review of a trustee's decision concerning eligibility for pension benefits was limited to a determination of whether that decision was arbitrary and capricious, not supported by substantial evidence, or contrary to law. *See Gaines v. Amalgamated Insurance Fund*, 753 F.2d 288, 289 (3d Cir. 1985); *see also Wolf v. National Shopmen Pension Fund*, 728 F.2d 182, 187 (3d Cir. 1984); *Rosen v. Hotel and Restaurant Employees and Bartenders Union*, 637 F.2d 592, 596, n.5 (3d Cir.), *cert. denied*, 454 U.S. 898 (1981).

However, in *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101 (1989), this Court held that review of a trustee's interpretation of a plan should be *de novo* unless the plan documents conferred on the trustees discretion in determining benefit eligibility. The plan currently before the Court, the 1974 Pension Plan, contains language that clearly grants the trustees of that plan sufficient discretion to preclude *de novo* review. Article VIII.A of the 1974 Pension Plan states that:

> The Trustees or such other named fiduciaries as may be properly designated shall have full and final determination as to all issues concerning eligibility for benefits.

(App. p. 299a.) Article VIII.B(1) further provides that:

> The Trustees are authorized to promulgate rules and regulations to implement this Plan, and those rules

> and regulations shall be binding upon all persons dealing with and Participants claiming benefits under this Plan.

(App. p. 300a.) Thus, Articles VIII.A and B(1) of the 1974 Pension Plan clearly reflect the intent of the Plan's settlors to confer discretion to determine eligibility on the Trustees.[6] The District Court and the Court of Appeals properly concluded that the appropriate standard of review for decisions under the 1974 Pension Plan is a deferential one. This is consistent with the deferential review accorded the decisions under the 1974 Plan (or its sister plan with identical language) in the Fourth and Sixth Circuits. See *Boyd v. Trustees of the UMWA Health and Retirement Funds*, 873 F.2d 57, 59 (4th Cir. 1989) and *Baker v. UMWA Health and Retirement Funds*, 929 F.2d 1140 (6th Cir. 1991).[7]

Following the Court's decision in *Firestone*, the Third Circuit has held that when a plan contains provisions which give the administrator discretion in making eligibility determinations, the arbitrary and capricious standard applies. *Stoetzner v. U.S. Steel Corp.*, 897 F.2d 115, 119 (3d Cir. 1990). Although he did below, Rishel

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[6] The UMWA and the Bituminous Coal Operators Association ("BCOA"), an organization representing a number of bituminous coal industry employers, are the settlors of the 1974 Pension Trust. The terms of the 1974 Pension Plan are collectively bargained. See *UMWA Health and Retirement Funds v. Robinson*, 455 U.S. 562 (1982).

[7] In *Firestone*, this Court indicated that evidence of conflict of interest on the part of the plan trustee could affect the deference otherwise given his decision. 489 U.S. at 115. Rishel has not claimed, nor could he, that the Trustees suffer from a conflict of interest. The Plan is collectively bargained. The Labor Management Relations Act of 1947 requires an equal number of union and employer appointed trustees. 29 U.S.C. § 186. The Trustees are appointees of the UMWA and coal employers. They do not profit by the denial of claims, and must exercise their authority under the Plan "solely in the interest of the participants and beneficiaries." 29 U.S.C. § 1104(a).

does not now contest that the 1974 Pension Plan grants sufficient discretion to the Trustees so as to render deferential judicial review appropriate. (Petition at pp. 11-14).

The "question presented" by Rishel in his Petition is whether the Trustees' denal of his pension application under the terms of the 1974 Pension Plan was arbitrary or capricious or an abuse of discretion. (Petition at pp. 1-2). While certainly important to the two individuals involved, the Trustees' interpretation of the Plan's "coal industry" requirement does not raise an issue of federal law worthy of this Court's review.

In an attempt to create a "cert worthy" issue, Rishel "suggests that the ruling of the Circuit Court is one which is a departure from the accepted and usual course of judicial proceedings in that the Court has accepted at face value the reasons of the Funds which reasoning demonstrates arbitrary and capricious thought processes." (Petition at p. 11.) This, however, is only a restatement of Rishel's basic complaint—that the terms of the 1974 Pension Plan were improperly interpreted to deny him a pension.

B. Rishel Cannot Now Allege that the "Arbitrary and Capricious" Standard Is Not the Appropriate Deferential Standard

Rishel also asserts that "an important Federal question as to definition of the standard of review of trustees action after *Firestone Tire & Rubber Company v. Burch* [*sic*], 489 U.S. 101 (1989) case still needs to be decided and a standard for arbitrary and capricious conduct under ERISA needs to be articulated." (Petition at pp. 11-12).

In *Firestone*, this Court held that a trustee's decision must be reviewed *de novo* under ERISA unless discretion had been granted that trustee under the plan documents. 489 U.S. at 115. If discretion is granted, the reviewing court must give deference to the trustee's decision. It is

not clear whether Rishel intends to challenge the arbitrary and capricious standard as the appropriate deferential standard for cases in which discretion has been granted the trustee, or whether he only wishes to have this Court further "articulate" the "arbitrary and capricious" standard.

To the extent that Rishel is alleging that the arbitrary and capricious standard is not the appropriate standard for cases in which discretion is conferred upon a trustee, he raises that challenge now for the first time.[8] Arguments or objections not raised in the lower courts should not be raised for the first time in this Court. *California v. Taylor, et al.*, 353 U.S. 553, 556, n.2 (1957); *United States v. Donnelly*, 397 U.S. 286, 319, n.5 (1970); *Singleton v. Wulff*, 428 U.S. 106 (1976). The Trustees clearly had no opportunity to offer arguments in support of the arbitrary and capricious standard because Rishel did not in the lower courts contend that it was not the appropriate deferential standard.

Only in "exceptional cases" will this Court decide questions not raised or decided in the lower courts. *Duignan*

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[8] At no point below did Rishel assert that when deferential review was authorized under *Firestone*, the standard was anything other than "arbitrary and capricious." In his complaint, Rishel alleged that the Trustees acted arbitrarily and capriciously in denying his pension. (App. p. 8a.) While Rishel initially claimed that a *de novo* review was required, he also recognized that if a deferential standard was called for under *Firestone*, that standard was arbitrary and capricious. (App. p. 468a.) The District Court held that the arbitrary and capricious standard was applicable because the plan documents granted discretion to the Trustees to interpret its terms. (App. pp. 498a, 483a.) In the Court of Appeals, Rishel asserted that a *de novo* review was required, but argued that if a deferential standard was to be applied, the Trustees should be held to have been arbitrary and capricious. (Appellant's Brief at p. 8.) Once it was determined that the Trustees were granted discretion under the Plan, neither the District Court nor the Court of Appeals considered any standard other than the "arbitrary and capricious" standard adopted in the Third Circuit because Rishel did not raise the issue.

v. United States, 274 U.S. 195 (1927).[9] This case is not an "exceptional case." Indeed, it is not even clear that there is an issue as to the appropriate deferential standard. Rishel does not assert that the "arbitrary and capricious" standard applied by the lower courts was the wrong standard, nor does he suggest an alternative standard. Instead, he simply notes that the ". . . definition of the standard of review applicable after the *Firestone* . . . case still needs to be decided . . ." (Petition at p. 12). Because Rishel did not contend below that the "arbitrary and capricious" standard was not the appropriate deferential standard and because his is not an "exceptional case," he should not be allowed to raise the issue for the first time in this Court.

C. The "Arbitrary and Capricious" Standard Has Been Sufficiently "Articulated"

Rishel also asserts for the first time in his Petition that ". . . a standard for arbitrary and capricious conduct under ERISA needs to be articulated." (Petition at p. 12). Rishel does not propose a new definition for "arbitrary and capricious" nor does he assert that the definition used by the courts since ERISA's enactment is inappropriate for situations in which the plan documents grant the requisite discretion to plan trustees.

This strained attempt to create an issue of importance for this Court is misguided. The "arbitrary and capricious" standard under ERISA was well-developed prior to the *Firestone* decision. See Comment, *The Arbitrary and Capricious Standard Under ERISA: Its Origins and Application*, 23 Duquesne L. Rev. 1033, 1037-1039 (1985). While *Firestone* held that trustees' decisions should be

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[9] See *Glidden Co. v. Zdanok, et al.*, 370 U.S. 530, 536 (1962) (allowed challenge to constitutional authority of judicial appointment); *Youakim v. Miller*, 425 U.S. 231 (1976) (remands issue of conflict between state law and Social Security Act raised first in Supreme Court).

reviewed *de novo* unless the plan gives them discretion, nothing in the decision suggests that the decisions of trustees to whom discretion has been granted should not continue to be reviewed under the arbitrary and capricious standard. 489 U.S. at 109 (rejects only "wholesale" adoption of arbitrary and capricous standard). Under the traditional arbitrary and capricious standard, the court determined ". . . whether the challenged decision resulted from a 'consideration of the relevant factors and whether there has been a clear error of judgment.'" *Wolf v. National Shopmen Pension Fund*, 728 F.2d 182 (3d Cir. 1984) *quoting Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1984). A plan trustee's decision was upheld unless the court found that it was not "rational." *Id.*, *quoting Federal Communications Commission v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978).

Following *Firestone*, most circuits have continued to apply this traditional standard when reviewing the decisions of trustees on whom discretion has been conferred.[10] In some cases, this standard is labeled "abuse of discretion" and in others "arbitrary and capricious." Some courts use the terms interchangeably. These courts have upheld a trustee's interpretation of a plan unless it is "unreasonable" or "irrational." See *Curtis v. Noel*, 877

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[10] In articulating the post-*Firestone* deferential standard, most courts rely upon pre-*Firestone* "arbitrary and capricious" formulations. See *Batchelor v. International Brotherhood of Elec. Workers Local 861 Pension and Retirement Fund*, 877 F.2d 441, 444 (5th Cir. 1989); *Miller v. Metropolitan Life Ins. Co.*, 925 F.2d 979, 984 (6th Cir. 1991); *Saracco v. Local Union 286 Pension Fund*, 942 F.2d 1213, 1215 (7th Cir. 1991); *Oldenburger v. Central States Southeast and Southwest Areas Pension Fund, et al.*, 934 F.2d 171, 173 (8th Cir. 1991); *Johnson v. Trustees of Western Conf. of Teamsters Pension Trust Fund*, 879 F.2d 651, 654 (9th Cir. 1989); *Woolsey v. Marion Laboratories, Inc.*, 934 F.2d 1452, 1457 (10th Cir. 1991); *Guy v. Southeastern Iron Workers' Welfare Fund*, 877 F.2d 37, 39 (11th Cir. 1989).

F.2d 159, 161 (1st Cir. 1989) (deferential review); *Miller v. Metropolitan Life Insurance Company*, 925 F.2d 979, 985 (6th Cir. 1991) (arbitrary and capricious); *Lister v. Stark*, 942 F.2d 1183, 1188 (7th Cir. 1991) (declines to choose); *Oldenburger v. Central States Southeast and Southwest Areas Teamster Pension Fund, et al.*, 934 F.2d 171, 173 (8th Cir. 1991) (arbitrary and capricious); *Woolsey v. Marion Laboratories, Inc.*, 934 F.2d 1452, 1457 (10th Cir. 1991) (arbitrary and capricious); *Anderson v. Blue Cross/Blue Shield of Alabama*, 907 F.2d 1072, 1075-76 (11th Cir. 1990) (synonymous).

Some courts have provided additional guidance for applying this deferential standard, and have looked to pre-*Firestone* cases to do so. The Tenth Circuit has stated that the trustees' decision "need not be the only logical one nor even the best one. It need only be sufficiently supported by facts within their knowledge to counter a claim that it was arbitrary or capricious." *Woolsey*, 934 F.2d at 1460. The Fifth and Eleventh Circuits have recognized some factors which are helpful in assessing trustees' decisions, including the uniformity of the trustees' construction, its consistency with a fair reading of the plan, and any unanticipated costs associated with the applicant's interpretation. *Guy v. Southeastern Iron Workers' Welfare Fund*, 877 F.2d 37, 39 (11th Cir. 1989); *Jordan v. Cameron Iron Works, Inc., et al.*, 900 F.2d 53, 56 (5th Cir. 1990), *cert. denied*, 112 L.Ed.2d 308. The Seventh Circuit has stated that a trustee's decision will not be upheld if "the evidence demonstrates that he failed to consider an important aspect of the problem, offered an explanation which runs counter to the evidence or is so implausible that it could not be ascribed to a difference in view or the product of expertise." *Lister v. Stark*, 942 F.2d at 1189. In the Sixth Circuit, courts ask whether the trustee's decision was the result of deliberative, principled reasoning process and was supported by substantial evidence. *Baker*, 929 F.2d at 1144.

As illustrated by these post-*Firestone* cases, there is no shortage of guidance for applying the "arbitrary and capricious" standard. Rishel cannot demonstrate a need for this Court to further elaborate on the "arbitrary and capricious" standard. The post-*Firestone* cases make clear that the standard is one of "reasonableness" as it was prior to *Firestone*. Rishel does not challenge this standard. His desire to have this court "articulate" a standard for arbitrary and capricious conduct simply reflects his disappointment with the results of the lower courts' review in his case, and not a dearth of guidance on the issue. The "arbitrary and capricious" standard is a venerable and workable standard. It does not require "articulation," particularly in a case in which the issue is raised for the first time in this Court.

II. THE DENIAL OF RISHEL'S PENSION APPLICATION WAS NOT ARBITRARY AND CAPRICIOUS

The Trustees did not act arbitrarily or capriciously in denying Rishel's service pension application. Their interpretation of the 1974 Pension Plan was neither "unreasonable" nor "irrational". Articles IV.A(1) and B(1)(a) of the 1974 Pension Plan direct the Trustees to award pension credit for classified employment in the coal industry. Article IV.A(1) states in pertinent part that:

> A Participant shall receive credit for a year of [non-signatory] service for any calendar year in which he worked, subsequent to December 31, 1936, as an employee in a job classified in the then existing bituminous coal wage agreement *for an employer in the coal industry* . . . .

(Emphasis added.) (App. p. 291a.) Article IV.B(1)(a) further provides that *signatory* service also is earned only by working for a coal industry employer. (App. p. 371a.)

Thus, Article IV.A(1) and B(1) provide that an applicant for a service pension must demonstrate that he performed classified work *and* that that work was per-

formed for a coal industry employer. Thus, it is not sufficient that Rishel performed classified work [11] or even that he worked in or about coal mines. Rishel must also demonstrate that his employer is a coal industry employer. Rishel's employer, Wolfe & Wolfe, is not a coal industry employer. Wolfe & Wolfe does not produce, process, prepare, or transport coal. Wolfe & Wolfe simply delivers the products of Martin Marietta and Benwood Limestone to the customers of those suppliers, some of whom happen to be coal companies. In fact, Wolfe & Wolfe does not even perform a service for or contract with a coal company. Thus, Wolfe & Wolfe is no more a coal industry employer than is UPS when it makes deliveries to coal companies on behalf of suppliers. Both UPS and Wolfe & Wolfe are trucking companies that provide services to suppliers, not to coal companies. This relationship to the coal industry is simply too attenuated to render Wolfe & Wolfe a coal industry employer.

Because Rishel fails to understand the distinction between classified employment and coal industry employment, he relies on the Trustees' award of pension credit to employees of Torrance Trucking to support his claim that he should receive pension credit for his employment at Wolfe & Wolfe. The Trustees awarded credited service to employees of Torrance Trucking Company ("Torrance Trucking"), a signatory trucking company that had contracted directly with signatory coal companies to deliver supplies to them. (App. p. 367a). Rishel argues that he performed the same type of duties as the employees of Torrance Trucking who received pension credit. However, Rishel was denied a service pension not because of the type of work that *he* performed but because of the nature of *his employer's* relationship to the coal industry. The Trustees have consistently recognized this distinction. In Question and Answer ("Q&A") 60, the

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[11] This is obvious; otherwise any laborer or trucker in any industry could claim a pension.

Trustees have provided that an employee of a signatory trucking company qualifies for pension credit while hauling mine refuse from the tipple to the slate dump for a signatory coal company. (App. p. 409a.)[12] By implication, had the trucking company been hauling for someone other than a coal company, no pension credit would accrue. This explains the Trustees' award of credit to the employees of Torrance Trucking, which had contracted directly with a signatory coal company, but not to employees of Wolfe & Wolfe, which had contracted with an intermediate supplier.

Rishel also asserts that the Trustees denied him pension credit for his work at Wolfe & Wolfe because the Trustees failed to collect pension contributions from the company. To the contrary, the Trustee did not "fail" to collect contributions from Wolfe & Wolfe. They determined that Wolfe & Wolfe owned no such contributions for the same reason that its employees are ineligible for pension credit. (App. p. 437a.) An employer, even one signatory to a collective bargaining agreement, owes contributions to the 1974 Pension Trust only if that employer is a coal industry employer. If it is determined that an employer is within the coal industry, pension credit is granted whether or not the plan is actually able to collect the contributions the employer owes the Plan. However, when, as here, the Trustees determine that an employer is not a coal industry employer, contributions may not be assessed nor pension credit awarded. The denial of pension credit is not based upon a failure to collect contributions but rather on the fact that the em-

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[12] Article VIII. B(1) of the 1974 Pension Plan grants the Trustees of the 1974 Pension Trust authority to "promulgate rules and regulations to implement this Plan, and those rules and regulations shall be binding upon all persons dealing with Participants claiming benefits under this Plan." (App. p. 300a.) Accordingly, the Trustees have developed a series of Questions and Answers, commonly referred to as "Q&A"s, to interpret and implement the 1974 Pension Plan.

ployer is not in the coal industry as required by Article IV.A(1) and B(1)(a) of the 1974 Pension Plan.

The 1974 Pension Plan obviously does not cover every employee of every business entity that may have some contact with companies that produce or process coal. Instead, Articles IV.A(1) and B(1)(a) of the 1974 Pension Plan indicate that service credit will only be granted for work performed for a "coal industry" employer. In the instant case, Wolfe & Wolfe's relationship with the coal industry is simply too attenuated to render it a coal industry employer. Wolfe & Wolfe was a trucking company, one of whose customers was a supplier to coal companies and others. The Trustees of the 1974 Pension Trust properly concluded that Wolfe & Wolfe was not a "coal industry" employer within the meaning of the 1974 Pension Plan. Thus, they properly declined to assess contributions against Wolfe & Wolfe and were required to deny pension credit to its employees. The Trustees' interpretation of the 1974 Pension Plan to deny coverage to Rishel was based upon a principled reasoning process and was properly sustained by the lower courts.

CONCLUSION

While it is undeniably significant to him, Rishel's pension denial does not raise a substantial federal issue worthy of this Court's review. Rishel's attempt to raise an issue respecting the standard of review must be rejected because he failed to raise that issue below. Accordingly, the Trustees respectfully submit that Rishel's Petition for Certiorari should be denied.

Respectfully submitted,

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Dated: November 26, 1991

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